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# Confrontation Clause Curiosities: When Logic and Proportion Have Fallen Sloppy Dead

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# CONFRONTATION CLAUSE CURIOSITIES: WHEN LOGIC AND PROPORTION HAVE FALLEN SLOPPY DEAD

*Randolph N. Jonakait\**

## I. THE TRIAL RIGHTS OF ENGLISHMEN

This symposium title's use of "curioser" reminded me that I had put aside a draft labeled "The Curious Notion that the Sixth Amendment Constitutionalized the Trial Rights of Englishmen." I was referring to Justice Scalia's opinion in the confrontation case of *Giles v. California*, which stated:

It is not the role of the courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen.<sup>1</sup>

This interpretive fundament is similar to what Scalia said for the Court in *Crawford v. Washington*: the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."<sup>2</sup> The *Giles* assertion, however, differs from the earlier statement: it does not confine itself to the Confrontation Clause but gives a principle for all the Sixth Amendment guarantees. And Scalia seems to be indicating some sort of interpretive shift, for the "trial rights of Englishmen" is not synonymous with the common law. But if there is a shift,

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<sup>1</sup> *Giles v. California*, 554 U.S. 353, 375 (2008).

<sup>2</sup> *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

what does it mean? *Giles* gave no explanation for the change, and I realized that I could only speculate about the significance, if any, of the newer formulation. Curious, I mused, and my thoughts, apparently like those of Robert Pitler, who organized this symposium, turned to Lewis Carroll's Alice. I, being of a certain age, however, also thought of the Alice mediated through the Jefferson Airplane.<sup>3</sup> Grace Slick seemed to be speaking to me. If I wanted to know the significance of the differences in the assertions in *Crawford* and *Giles*, I could only "Go ask [Scalia], when he's ten feet tall."<sup>4</sup>

The curious might have further questions, such as what is the constitutional source of Scalia's *Giles* pronouncement? It was unadorned with references or citations. That nakedness is not surprising for, as far as I have been able to ascertain, no one in the framing era said that the Sixth Amendment was meant to guarantee the trial rights of Englishmen or the common law.<sup>5</sup> The *Giles*' statement is in the curious position of being, charitably, a self-evident proposition or, less charitably, a bare assertion.

The notion that the Sixth Amendment seeks fairness through the specific means of the trial rights of Englishmen is also curious, if not mystifying, since it is simply flat out wrong. At the time of the drafting of the Bill of Rights, England permitted

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<sup>3</sup> The lyrics to the Jefferson Airplane song *White Rabbit* can be found at various places online. See, e.g., *White Rabbit*, LYRICSDOMAIN, [http://www.lyricsdomain.com/10/jefferson\\_airplane/white\\_rabbit.html](http://www.lyricsdomain.com/10/jefferson_airplane/white_rabbit.html) (last visited Feb. 21, 2012).

<sup>4</sup> *Id.*

<sup>5</sup> See Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine*, 71 BROOK. L. REV. 35, 83 (2005) ("English common law may be more accessible or more well-defined than American common law, but Justice Scalia's survey of the historical record did not provide any evidence that the original meaning was tied to English common law. There is no mention of English common law in the statements from the ratification debates quoted by Justice Scalia."); see also Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 735-38 (1976) ("[I]t is remarkable that there was so little debate [about the Sixth Amendment.] . . . [T]he historical background of the Bill of Rights leaves unclear the intent of the Framers of the [F]ifth and [S]ixth amendments.").

counsel for misdemeanors and by statute in treason cases. For ordinary felonies, however, an accused could have counsel for issues of law—and perhaps at the indulgence of the court, lawyers could cross-examine witnesses—but such defendants were prohibited from having the full assistance of counsel.<sup>6</sup>

Americans of the framing era saw this limitation as inhumane and cruel, and the Sixth Amendment's grant of a full right of counsel to all those charged with crimes was a conscious rejection of English law. For example, James Wilson, a drafter of the Constitution and an original Supreme Court Justice, criticized the English law: "The practice in England is admitted to be a hard one, and not to be very consonant to the rest of the humane treatment of prisoners by the English law."<sup>7</sup> In contrast, he wrote, "It is enacted by a law of the United States that persons indicted for crimes shall be allowed to make their full defense by counsel learned in the law."<sup>8</sup>

Zephaniah Swift, who later served as Chief Justice of the Connecticut Supreme Court, was even harsher in his assessment of the English law and Connecticut's rejection of it. In his treatise published in 1796, he wrote:

We have never admitted that cruel and illiberal principle of the common law of England, that when a man is on trial for his life, he shall be refused counsel, and denied those means of defence, which are allowed, when the most trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten our indignation at the practice; for it is apparent to the least consideration, that a court can never furnish a person accused of the crime with the advice, and assistance necessary to make his defence. . . . One cannot read without horror and astonishment, the abominable maxims of law, which

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<sup>6</sup> See Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 324–25 (2009) (discussing the right to counsel in eighteenth century England).

<sup>7</sup> JAMES WILSON, *THE WORK OF JAMES WILSON* 472 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).

<sup>8</sup> *Id.*

deprive persons accused, and on trial for crimes, of the assistance of counsel . . . . It seems by the ancient practice, that whenever a person was accused of a crime, every expedient was adopted to convict him, and every privilege denied him, to prove his innocence. . . .

The legislature has become so thoroughly convinced of the impropriety and injustice of shackling and restricting a prisoner with respect to his defence, that they have abolished all those odious laws, and every person when he is accused of a crime, is entitled to every possible privilege in make his defence, and manifesting his innocence, by the instrumentality of counsel . . . .<sup>9</sup>

Swift, writing a few years after the Sixth Amendment's ratification, saw the American right to counsel as an important rejection of what were then the limited trial rights of Englishmen.

It is clear that the Sixth Amendment rejected that then-existing English law. Even so, Scalia, in *Giles*, asserts that the Sixth Amendment sought fairness through the trial rights of Englishmen. How could the Supreme Court Justices be so clearly wrong? We seem to be in Alice's world, where following the rabbit leads down the rabbit hole of someone's imagination. And how is one to understand this imaginary history? Grace Slick's voice returns, "Call [Scalia], when he was just small."

## II. THE MYTH OF RALEIGH'S TRIAL

Those going down the confrontation rabbit hole tend to spy Sir Walter Raleigh. His trial, even if not the wellspring of the confrontation right, is seen as emblematic of the kind of proceedings the Confrontation Clause was meant to prohibit. Justice Scalia stated what many believe when he said that "Raleigh's infamous 17th-century treason trial . . . remains the canonical example of a Confrontation Clause violation. . . ."<sup>10</sup>

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<sup>9</sup> ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 398-99 (Nabu Press 2011) (1796).

<sup>10</sup> *Michigan v. Bryant*, 131 S. Ct. 1143, 1174 (2011) (Scalia, J., dissenting).

But as Professor David Alan Sklansky points out, for Raleigh's case to guide us today, "[w]e need to decide precisely what was wrong with it. . . ." <sup>11</sup> At this point, however, the vision becomes obscured, perhaps by the smoke from the tobacco that the sometime-historian Bob Newhart suggests Raleigh brought back to Europe. <sup>12</sup> The haze prevents answers to some basic questions: "Was confrontation so important because Cobham had provided key evidence against Raleigh, because Cobham was in Crown custody, because Cobham reportedly had retracted his incriminating statements," or some combination of these procedures? <sup>13</sup>

Such questions are based on the presupposition that the trial was seen as unfair because of the way that the prosecution presented evidence. But surely there are other reasons why the trial could be perceived as unjust: perhaps it was because Raleigh was without a defense advocate, apparently could not call witnesses of his own, and could not call Cobham. Maybe it was unjust because Raleigh did not have notice of the charges or the evidence before the trial, there was no neutral magistrate, the trial was not public, or because the trial, and the time it took place, were filled with religious intolerance. Later generations could have found various reasons for why Raleigh's trial was unjust, and the evidence we now call hearsay was just one of many interrelated reasons.

Of course, these more modern answers to the question of why Raleigh's trial was historically seen as unjust are not really the point. Instead, we should want to know what the framers and adopters of the Constitution thought the answers were. This we do not know. We do not know if the question was even posed. Indeed, nothing has been presented that people of the framing era, whether actually involved with crafting our Constitution or not, gave Raleigh's trial any thought at all. Even if we accept the unsupported supposition that Raleigh's trial was

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<sup>11</sup> David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1690 (2009).

<sup>12</sup> See, e.g., *Introducing Tobacco to Civilization*, YOUTUBE, <http://www.youtube.com/watch?v=kO1nCuVQIeg> (last visited Feb. 13, 2012).

<sup>13</sup> Sklansky, *supra* note 11, at 1690.

seen in the framing era as a canonical example of an unfair trial, we do not know why.

### III. THE IMPORTANCE OF THE CHOSEN MYTH

Perhaps we all need a myth to lean on, but the one we choose can matter. Somehow the notion that the Confrontation Clause was meant to prevent trials like Raleigh's leads to the conclusion that the Clause's prime concern is with the use of ex parte depositions from absent witnesses. If, however, the Salem witch trials had been picked as exemplars of the unfairness that the Sixth Amendment sought to prevent, the focus would be different. Certainly, in some ways, the Salem trials are a better choice than Raleigh's trial. While we do not have any indication that Raleigh's trial got any real consideration from Americans, we do know that the Salem trials had widespread notoriety.

The witch trials were quickly, widely, and consistently perceived as unjust. In print, correspondence, and no doubt in public and private discourse, colonial Americans pondered the mistakes. No colonial trials were examined more. The consensus concluded that injustices were committed, even though existing law and procedures had been followed. Something, then, had to be wrong with the law and procedures, and consequently pressures for change and reform emerged from these trials.<sup>14</sup>

If these trials formed part of the Sixth Amendment's origin myth, as they well could, then the focus of the Confrontation Clause doctrine would be different from that adopted by the Court, since the

flaws at Salem did not come from the lack of face-to-face confrontation. Face-to-face confrontation was not only granted, it was crucial to many of the proceedings. The secret generation of evidence by the state did not occur. The proceedings, including the preliminary examinations, were very public. Ex parte depositions were not used. The trials relied heavily on evidence adduced at preliminary examinations, but both the accused and the

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<sup>14</sup> Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 127-28 (1995).

accuser were present at them. If those examinations can be labeled depositions, they were not *ex parte*.<sup>15</sup>

Analysis of the Salem trials continued at least into the mid-eighteenth century. In 1750 Thomas Hutchinson, who later would be governor of Massachusetts, published documents from the witch trials along with a commentary. He concluded that the trials were unfair even though the accusers faced the accused in open court and even though the trials were not based on depositions. The proceedings were “absurd and dangerous,” at least in part because “[i]nstead of suspecting and shifting the witnesses, and suffering them to be cross-examined, the authority, to say no more, were imprudent in making use of leading questions, and thereby putting words into their mouths for suffering others to do it.”<sup>16</sup>

#### IV. THE CURIOUS LIMITATION ON THE CONFRONTATION RIGHT

The Court’s choice of myth has led to the conclusion that the Confrontation Clause’s purpose was to prevent *ex parte* depositions and, therefore, courts must prevent the modern equivalents of such evidence. The result has been, as the next section discusses, the Court’s increasingly Mad-Hatterish discussion of what is “testimonial” hearsay. But even if the Court has selected the correct myth and correctly pronounced the Confrontation Clause’s purpose, the Court has made an analytic leap by concluding that the constitutional right operates only when un-cross-examined testimonial evidence is presented. Perhaps the Framers did want to prevent *ex parte* depositions, but that does not necessarily mean that their selected method—the confrontation right—only applies when the equivalent of an *ex parte* deposition occurs. It is possible that the Framers were adopting a right like other Sixth Amendment provisions that prevent specific abuses by giving an affirmative right that applies generally and is not limited to the animating harm.

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<sup>15</sup> *Id.* at 128–29.

<sup>16</sup> Thomas Hutchinson, *History of the Province of Massachusetts Bay*, reprinted in THE PUBLIC CONSCIENCE 15, 18–19 (Donald S. Thomas ed., 1972); see Randolph N. Jonakait, *The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615, 621 n.24 (1992) (discussion of Hutchinson’s comments on Salem witch trials.).



For example, the jury trial provision of the Sixth Amendment was created, according to the Supreme Court, to prevent government oppression. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."<sup>17</sup> If this right were interpreted as confrontation is, the Court would give standards for determining the presence of a corrupt or overzealous prosecutor or a compliant, biased, or eccentric judge and limit jury trials to these situations. The Sixth Amendment jury trial right acts as a check on such judges and prosecutors, but the guarantee applies generally and even in the established absence of an abusive prosecutor or judge in the particular trial.

Even if the Confrontation Clause's birth was prompted by a specific abuse, its text, like that of the jury guarantee, is not expressly limited to restraining a particular pernicious practice. Just as the jury right operates generally and protects an accused even if the right's animating harm is not present, the confrontation right, even if opposition to *ex parte* depositions gave a reason for its birth, could grant an accused rights even when the concern regarding *ex parte* depositions is irrelevant. Surely, it ought to be at least considered curious that the Court has not explained why the Confrontation Clause should operate differently, or in a more limited manner, from other Sixth Amendment rights.

#### V. CONFRONTATION'S IDIOSYNCRATIC TERMS

Of course, for those most truly affected by the Confrontation Clause—the lawyers seeking to admit or exclude evidence, the judges who must decide if the evidence is admissible, and the defendants whose lives will be irrevocably changed by the decisions—the important point is not how the Court got where it is, but whether some specific hearsay is "testimonial."

The formal definition seems clear. Justice Sotomayor,

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<sup>17</sup> *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968).

writing for the Court in *Michigan v. Bryant*, relied on the definition in *Davis v. Washington*<sup>18</sup> that statements “are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>19</sup> Justices Scalia and Ginsburg dissented and Justice Kagan did not participate in *Bryant*, but Scalia and Kagan both joined in the portion of Ginsburg’s opinion in *Bullcoming v. New Mexico* that stated, “To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.’”<sup>20</sup> Justice Thomas, too, may agree with this definition, but he is the outlier because he maintains that the confrontation right only applies when testimonial evidence is somehow “formal.”<sup>21</sup>

While the Court may have a consensus on the definition of “testimonial,” the Court’s fractured decisions reveal that the Justices differ on how the term applies. This is hardly unexpected. The term “testimonial hearsay” does not appear in the Constitution. It is not a term used in the framing era, nor can it be found in English common law. It is not a term used in Raleigh’s trial. In fact, it was not used in the eighteenth, nineteenth, or twentieth centuries. It is a new term, first coined in the Court’s decision in *Crawford v. Washington*<sup>22</sup> in 2004, without a history of interpretation, and it should not be surprising that this ahistorical, atextual term is malleable.

Indeed, many of the terms used in the present

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<sup>18</sup> *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>19</sup> *Michigan v. Bryant*, 131 S. Ct. 1143, 1154 (2011) (quoting *Davis*, 547 U.S. at 822).

<sup>20</sup> *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (quoting *Davis*, 547 U.S. at 822).

<sup>21</sup> See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring) (“I continue to adhere to my position that ‘the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’” (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring))).

<sup>22</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

Confrontation Clause doctrine have idiosyncratic meanings.<sup>23</sup> This includes, for example, Scalia's dissenting statement in *Bryant* that "[r]eliability tells us *nothing* about whether a statement is testimonial. Testimonial and nontestimonial statements alike come in varying degrees of reliability."<sup>24</sup> Scalia then offers an illustration. "An eyewitness's statements to the police after a fender-bender, for example, are both reliable and testimonial. Statements to the police from one driver attempting to blame the other would be similarly testimonial but rarely reliable."<sup>25</sup>

Even if Justice Scalia is correct that "reliability" should not be part of the testimonial analysis, his use of the term "reliability" is distinctive. Surely if the eyewitness or that driver testified in court consistently with what was told the officer, the jury, after considering other evidence and hearing cross-examination, might correctly rely on either the driver or the eyewitness, or both. The driver that Scalia deems rarely reliable may be giving an absolutely accurate rendition of what happened. Just because she was involved in the accident does not mean she was not telling the truth. And, of course, other evidence and cross-examination may reveal the eyewitness's statement—which Scalia presumed reliable—to be inaccurate. A "reliable statement," as Scalia conceives of it here, is not one that ultimately can be relied upon, but one made by a person who does not have an obvious motive to shade the truth. But a witness's motives, credibility, and bias are elements that are traditionally adduced by the finder of fact at a trial. Thus, reliability, Scalia suggests, can be determined without the information that only a trial can produce.

Scalia's use of "eyewitness," however, may seem even more curious. He posits that the eyewitness's statements are testimonial because, apparently, the eyewitness's assertions had the primary purpose of proving past events potentially relevant

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<sup>23</sup> I explore some of these terms in Randolph N. Jonakait, "Witnesses" in *the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155 (2006).

<sup>24</sup> *Bryant*, 131 S. Ct. at 1175.

<sup>25</sup> *Id.*

to a criminal case. As the Court has come to define the term, this eyewitness would be a “witness against” the accused if his statements were offered by the prosecution. Consistent with the Confrontation Clause, such hearsay could be admitted only if the accused had the opportunity to cross-examine the eyewitness. But if that eyewitness had made the very same statement to a non-law enforcement official, such as a spouse or a bystander, apparently the statement would be nontestimonial. Since the eyewitness has not made a testimonial statement, the eyewitness does not bear testimony, and the Confrontation Clause would not bar introduction of such statements. The very same words that could not be admitted when said to the police, except under cross-examination, now could be. Why? Because under confrontation terminology, the “eyewitness” is no longer a “witness.” In this curious world that a Lewis Carroll might appreciate, words have lost their normal English meanings.

This result, again, suggests that the Confrontation Clause is interpreted differently from its companion rights. The Sixth Amendment does not merely restrain the government. Instead, it acts as a check on official power by granting affirmative rights to an accused:

[T]he Sixth Amendment is not a collection of negatives. Instead, the provision grants positive guarantees to the accused. The controlling question is not what did the government do, but what did the defendant get. Did he get a jury? Did he get an attorney? Did he get notice? Did he get the chance to produce witnesses? and so on.<sup>26</sup>

The Confrontation Clause operates differently. It is not viewed from the accused’s perspective. While the accused could benefit similarly from cross-examination of an out-of-court declarant whether a statement is made to a bystander or a police officer, he only gets the constitutional protection, apparently, if law enforcement was involved. Present interpretation, in effect, focuses on governmental actions or the declarant’s intentions, not on what right the accused was actually afforded. Returning to a comparison of the right to a jury trial, this shift in focus is

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<sup>26</sup> Jonakait, *supra* note 14, at 617–18.

akin to concluding that as long as the state did not do something to deny an accused a jury trial, his Sixth Amendment right was not violated, instead of asking, Did the accused get a jury trial?

#### VI. IS BULGER A RALEIGH?

The Confrontation Clause's present interpretation is based on the curious use and reinvention of history. It ignores the methods used to interpret other Sixth Amendment provisions, and employs terms with idiosyncratic meanings, for which the Justices cannot agree on an application. But since the Court gives fealty to the proposition that trials like Sir Walter's were meant to be forbidden, surely the search for and exclusion of testimonial hearsay prevents Raleigh-like trials. But does it, really?

The Ohio Court of Appeals recently affirmed the conviction of Deon Bulger for the possession of a weapon. In a drug buy-and-bust operation, Cleveland Detective Luther Roddy drove a person, identified in the appellate opinion as "the confidential reliable informant ('CRI'),"<sup>27</sup> to a buy site. Roddy parked his undercover car nearby. Another detective observed from a second vehicle. The officers saw the CRI approach a person later identified as Byron Turner in a residential driveway. The CRI quickly backed away from Turner and returned to Roddy's car. Roddy asked, "Did you get anything?" The CRI responded that he had not and continued, "he pulled a gun on me and told me to get the f\_\_\_\_ out of there, so I came right back to you."<sup>28</sup> Roddy radioed for back up. A responding officer saw "Turner quickly take a dark object from his waistband and hand it to"<sup>29</sup> the defendant Bulger, who went into the house owned by Turner's uncle.

A few minutes later, the police found Bulger in the living room, apparently feigning sleep with his heart "beating really,

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<sup>27</sup> State v. Bulger, Nos. 94665, 94666, 94667, 2011 WL 3359861, 2011-Ohio-3828U, ¶ 5 (Ohio Ct. App. Aug. 4, 2011).

<sup>28</sup> *Id.* ¶ 21.

<sup>29</sup> *Id.* ¶ 6.

really fast.”<sup>30</sup> In the basement under the furnace, the police found a fully loaded, .9 millimeter gun. According to the testimony, the gun “was the size, shape, and color of the object the detectives had seen Turner display in his waistband.”<sup>31</sup> Turner’s grandmother indicated that Turner lived with her in a nearby house, and the police found .9 millimeter bullets in Turner’s bedroom.

The CRI did not testify, but for convenience’s sake, let’s give him a name, perhaps Larry Cobham. The appellate opinion does not explain Cobham’s absence. As far as we know, he was available but, as a matter of strategy, the prosecution did not call him.

Cobham’s statement about seeing Turner with a gun was admitted over a hearsay objection as a present sense impression. Surely, as the appellate court found, this was a correct ruling since Detective Roddy made clear that only moments elapsed between the time when Cobham perceived Turner and when he reported to the officer that Turner had a gun.

The appellate court also ruled that the admission of Cobham’s statement did not violate the Confrontation Clause because it was not testimonial. Under present interpretations of that right, that also seems correct. Whether the statement “[h]e pulled a gun on me” is considered objectively from Cobham’s viewpoint, from the viewpoint of both the police and Cobham’s perspective simultaneously, or from the totality of the circumstances, the detective’s question and Cobham’s response did not have the primary purpose to prove past events relevant to a later criminal prosecution. This was not evidence collection. The statement was “not procured with a primary purpose of creating an out-of-court substitute for trial testimony.”<sup>32</sup> The Ohio court correctly stated, “The CRI could not have expected his statement to be used as evidence at trial. . . .”<sup>33</sup> Instead, this was important information about a police operation in its midst that would affect its next actions.

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<sup>30</sup> *State v. Turner*, No. 94617, 2010 WL 5550255, 2010-Ohio-6475, ¶ 46 (Ohio Ct. App. Dec. 30, 2010).

<sup>31</sup> *Id.*

<sup>32</sup> *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

<sup>33</sup> *Bulger*, 2011 WL 5550255, ¶ 22.

*State v. Bulger* is a minor case that correctly applies present doctrines and seems of little significance. On the other hand, perhaps it ought to make us wonder whether Raleigh's trial has truly been banished.

The CRI's hearsay statement seems to have been essential to Bulger's conviction. Police officers did testify that they saw Turner take an object from his waistband that bore a resemblance to the recovered weapon and hand it to Bulger. The police, however, did not state that they saw Turner pass a gun to Bulger. The gun was not discovered in Bulger's immediate possession, but on a different floor from where he was found in a house that was not his residence and he did not own. No one testified that Bulger hid the gun or that he was familiar with the place where it was secreted. The bullets that matched the gun were not found where Bulger lived. Only if the trier of fact concluded that Turner handed Bulger a gun could it be rationally concluded beyond a reasonable doubt that Bulger had possessed the recovered weapon. No in-court testimony established that, but the "confidential reliable informant's" out-of-court assertion, if believed, did. Although this hearsay is not testimonial, and under present doctrine can be presented without cross-examination, it surely provided an effective substitute for trial testimony. In other words, Bulger was seemingly convicted because of the unfronted words of an anonymous police informant.

Does this make Bulger's case like Raleigh's? Certainly differences can be found. If Raleigh's case was unfair because the government sought to get hearsay from Cobham for later use at trial, or Cobham gave it for that purpose, then *Bulger* differs significantly from Raleigh's trial. On the other hand, the two cases share the essential similarity of unfronted out-of-court statements by government informants acting as effective, essential substitutes for trial testimony when no reason was given for the lack of in-court testimony. And on some level, Bulger's case is more disturbing than Raleigh's, since the hearsay against Bulger came from an *anonymous* informant.

Sir Walter's lament may very well have application in *Bulger*. Raleigh stated that "Cobham is absolutely in the King's mercy; to excuse me cannot avail him, by accusing me he may

hope for favour. It is you, then Mr. Attorney, that should press his testimony, and I ought to fear his producing, if all that be true which you have alleged." The confidential reliable informant may not have been as absolutely in the mercy of the government as Cobham was, but anyone with even superficial knowledge of our criminal justice system should not be surprised if an anonymous police informer sought favors from governmental power. He may have been "working off" his own arrest or getting paid. Like Cobham, his circumstances suggested that he would naturally incriminate the accused. Even so, like Cobham he was not called as a "witness," and surely part of the reason for that is the prosecution expected to use his out-of-court statements without any right of confrontation.

Any assumption that because the Confrontation Clause would prevent Raleigh's trial, it would also prevent convictions based on the uncontroverted words of anonymous police informants appears to be wrong. We can go further. If an undercover police officer reported to his partner in *Bulger* that a target had pulled a gun, the result should be the same. The hearsay of that undercover would not be "testimonial" and could be presented without confrontation. Furthermore, if two officers are in a patrol car on routine patrol, and one reports that a pedestrian they passed had pulled a gun and commands the driver to pull over, the police officer's hearsay report should be admissible without showing that the officer was unavailable, as non-testimonial, without any cross-examination. Although the undercover and the patrol officer may have been "eyewitnesses" to events important for a criminal prosecution, they are not "witnesses against" the accused.

Curious, to say the least.

## CONCLUSION

Confrontation Clause interpretations have contained many curiosities. Opinions have made historically inaccurate assertions. Raleigh's trial has become a central myth with little basis for its selection and with little thought given to the myth's meaning. Without explanation, the Clause has been interpreted differently from companion Sixth Amendment rights.



Interpretive terms have taken on unusual meanings, and trials like Raleigh's may still be occurring. Perhaps it is really best to leave the various curiosities to the legal commentators of the Jefferson Airplane.

When logic and proportion  
Have fallen sloppy dead  
And the White Knight is talking backwards  
And the Red Queen's "off with her head!"  
Remember what the dormouse said:  
"Feed your head, Feed your head  
Feed your head"<sup>34</sup>

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<sup>34</sup> See *White Rabbit*, *supra* note 3.